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No. 83-925

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

RALPH FREDRICK CARRICO,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Questions Presented on Certiorari	i
Parties to the Action	ii
Table of Authorities	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING CERTIORARI	11
CONCLUSION	
APPENDICES	

QUESTIONS PRESENTED ON CERTIORARI

I

A CONFICT BETWEEN THE UNITED STATES SUPREME COURT AND THE NINTH CIRCUIT EXISTS DUE TO THE DECISION BELOW WHICH UPHOLDS RESTRICTION OF CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, A DENIAL OF FUNDAMENTAL RIGHTS PROVIDED BY THE SIXTH AMENDMENT TO THE CONSTITUTION.

II

THE APPELLATE COURT'S DETERMINATION THAT APPELLANT DID NOT CONTEST THE EVIDENCE DENIED APPELLANT A "FAIR APPELLATE HEARING."

PARTIES TO THE ACTION

Ralph Frederick Carrico is the Petitioner. The United States of America is the Respondent.

TABLE OF AUTHORITIES

Cases	Page
Giglio v. United States 92 S. Ct. 763	19
Napue v. Illionois 360 U.S. 264, 271	17
Ohio v. Roberts 448 U.S. 56, 100 S. Ct. 2531	15
United States v. Alvarez-Lopez 559 F.2d 1155	14
Unites States v. Gerard 491 F.2d 1300	20
United States v. Harris 501 F.2d 1	11

CONSTITUTION

United States Constitution 6th Amendment	16

RULES & STATUTES

Title 28 United States Code
Section 1254(1)

NO.

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OF THE UNITED STATES

UNITED STATES OF AMERICA,

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Defendant/Petitioner,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner Ralph Fredrick Carrico prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding

OPINION BELOW

Appellant/Petitioner's Appeal was denied on July 14, 1983. Appellant/Petitioner's Petition for Rehearing and Request for Rehearing on Banc was denied on September 21, 1983. Unpublished Memorandum by the Court of Appeals attacned as Appendix A and B.

JURISDICTION

This Court has proper jurisdiction invoked pursuant to 28 U.S.C. 1254(i).

CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

"to be confronted with the witnesses against him;"

STATEMENT

This case involves a conviction in the District of California, Los Angeles, California, of the defendant on the following charges: Conspiracy to manufacture and possess with intent to distribute phencyclidine, 21 U.S.C Section 841; Possession of piperidine for use in manufacturing phencyclidine, 21 U.S.C. Section 841(d)(2); aiding and abetting, 18 U.S.C. Section 2(a); Possession with intent to distribute phencyclidine, 21 U.S.C. Section 841(a)(i). The District Court has original jurisdiction pursuant to federal statute 18 U.S.C. § 3231. The Appellate Court has jurisdiction pursuant to federal statute 28 U.S.C. § 12191.

Mr. Carrico was approached by government informant John Torrino with

the idea of opening a Western Bar and Restaurant. For this purpose Mr. Carrico permitted him to rent an office in one of Mr. Carrico's commercial buildings. It was at this time that Mr. Carrico and his daughter were working on his own real estate business, and were not concerned with the goings on in Torrino's portion of the building. Torrino introduced defendant Brown to Mr. Carrico "as a former restaurant employer of Torrino's".

Apparently, and without Mr. Carrico's knowledge, Torrino proceeded to build a laboratory for the manufacture of P.C.P. As a matter of the record of the trial proceedings, there was no witness produced outside of Torrino who ever heard Mr. Carrico discuss narcotics or any controlled substance with any person

at any time. Torrino was later discharged by Mr. Carrico from the restaurant partnership due to irresponsibility.

As a matter of record, Federal agent Sakato was called as a witness and she testified that while she had been present at Golden State Development Company she had never seen Mr. Carrico do anything except to sit in his portion of the office behind his desk. She further testified that she at no time saw Mr. Carrico go into the back room which was being utilized by informant Torrino. She further testified that on one occasion when she went to lunch with Mr. Carrico and Torrino that at no time did she hear Mr. Carrico discuss any narcotics.

The major argument by the government against Mr. Carrico is that he was a

party to moving certain equipment located therein to another location. Agents followed Mr. Carrico who was driving an Oldsmobile, and a pick-up truck which was being driven by defendant Bobby Brown. It was the governments contention that at this time the P.C.P. lab was moved and disassembled. Once again we are faced with a situation where there is absolutely no evidence outside of Mr. Torrino's testimony linking Mr. Carrico with the movement of any equipment which could be used for the manufacture of P.C.P. No stop and search was conducted.

Agent Michael Harmon testified at trial that he was located at an apartment building directly across the street from Golden State Development and that he witnessed the loading of various items,

resembling trash into the pick-up truck. He further testified that he did not at any time see Ralph Carrico in that area while the pick-up was being loaded. He did testify that ne saw Mr. Carrico drive his car up to that location and then leave with the pick-up truck following. He testified that he followed the two vehicles to a school yard area where at the side of the road both vehicles stopped, the drivers exited their vehicles had a discussion and then left once again. He did not follow either of the vehicles to their destination and he could not testify as to the purpose for stop and the conversation. Mr. Carrico and Mr. Brown testified that they were taking some trash to the dump and there was no evidence to contradict tnis.

Agent James Cunningham testified

that he observed Mr. Carrico get out of his car and go into his own office on several ocassions. There was nothing in his testimony which would serve as any evidence towards conviction. He did say that on one occasion when Mr. Carrico went into nis office he appeared to be excited because he walked fast.

Agent Johnson testified about various things that occurred in Anaheim Hills, but that he never saw Mr. Carrico at that location.

At no time did any witness testify that Mr. Carrico ever touched any P.C.P. or piperidine. At no time did any witness ever testify that Mr. Carrico was in possession of any equipment used to make either of those two chemicals. The only testimony that was before the jury was the accusation by a government

informant, whose cross-examination was severely limited by the trial judge.

There was absolutely nothing in the record to substantiate the conviction. As a matter of fact, it was Mr. Carrico who summoned the police when he discovered that there was some type of a powder in his motor home, which had been reported stolen by him and later recovered. That fact, which could have served to insure a not guilty verdict was excluded by the judge as being irrelevant. The government, on the other hand, was allowed to talk about the motor home. Furthermore, Torrino's habitual cocaine use was excluded from testimony along wth the reason or reasons for his recent suicide attempt, and his former membership in a Mafia family.

Defendant Carrico was arrested on

July 23, 1982 at his family residence in Hesperia, California. He was sentenced October 20, 1982 to six months incarceration, ten years parole, $70,000.00 in fines and 2500 hours of community service. Said incarceration began on November 14, 1983.

REASONS FOR GRANTING CERTIORARI

I

A CONFLICT BETWEEN THE UNITED STATES SUPREME COURT AND THE NINTH CIRCUIT EXISTS DUE TO THE DECISION BELOW WHICH UPHOLDS THE RESTRICTION OF CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS, A DENIAL OF FUNDAMENTAL RIGHTS PROVIDED BY THE SIXTH AMENDMENT TO THE CONSTITUTION.

The Ninth Circuit addressed this issue in the 1974 decision of United States v. Harris, 501 F.2d 1.

The Court declared:

"It is essential when the credibility of a witness is critical to the Government's case, that defense counsel be given maximum opportunity to test that credibility by exploring the motivation of the witness for testifying.

"Denial of right to effective cross-examination is constitutional error, and defendants need not demonstrate that they were prejudiced thereby.

"Refusal to permit defense counsel to inquire of government informant in narcotics prosecution as to where informant lived, and restricting questions directed at informant's motive for testifying and to his possible bias or prejudice, denied defendants a fair trial in case where reliability and credibility of informant may well have determined the guilt or innocence of defendants, especially where trial judge overstepped the bounds of

judicial propriety by excessively interjecting himself into the proceedings. U.S.C.A. Const. Amend. 6."

In the instant case, the District Court denied defense counsel's questions concerning informant Torrino's recent confinement to a mental institution, suicide attempt, cocaine abuse and distribution. (Page 8, Appellant's Opening Brief) Additionally, the District Court sustained several government objections, stated without grounds, to very material and relevant questions concerning Torrino's direct testimony given that same day. (Appellant's Opening Brief, page 9.) Questions which went directly to Torino's bias, Mr. Carrico's knowledge of any illicit activity, loading of the pick-up

truck, leading the way, and even Deputy Long's testimony of no unusual odors at Mr. Carrico's office.

The case of United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977) stated:

> "Extensive cross-examination of government witness designed to reveal any biases or prejudices of witnesses is compelled by confrontation clause; especially should great latitude be allowed when key prosecution witness is also a professional informant; deprivation of full and robust right of cross-examination cannot be excused for any lack of showing of specific prejudice

by defendant, and error in restricting cross-examination cannot be cured by later extraction of some of the evidence defense counsel sought to adduce from his full examination that was improperly curtailed by the court. U.S.C.A. Const. Amend. 6."

This Court has historically empnasized that the Confrontation Clause reflects a preference for face-to face confrontation at trial and that a primary interest secured by the provision is the right of cross-examination. This Court in Ohio v. Roberts 448 U.S. 56, 100 S Ct 2531, has stated:

"The absence of proper confrontation by an accused of witnesses against him at

his trial, as guaranteed under the Sixth Amendment, calls into question the ultimate integrity of the fact-finding process."

In the case at bar, petitioner Carrico is a 45 year old gentleman with no criminal record. He has a California Real Estate Brokers license and presently owns and manages a campground. It is doubtful he would recognize P.C.P if it was on his dinner table. Informant Torrino was employed not for the purpose to testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes in the future could be committed. Informant Torrino, in an effort to insure his reward, introduced a convicted felon, co-defendant Bobby Brown, to Mr. Carrico.

Torino should have been subjected to rigourous cross-examination. He was the principal government witness without whom there probably would have been no conviction. Napue v. Illinois, 360 U.S. 264, 271 (1959) has held:

> "The duty for this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.

II

THE APPELLATE COURT'S DETERMINATION THAT APPELLANT DID NOT CONTEST THE SUFFICIENCY OF THE EVIDENCE DENIED APPELLANT A "FAIR APPELLATE HEARING."

The decision stated that petitioner Carrico did not contest the sufficiency of the evidence. Argument I and II of Appellant's Opening Brief clearly addresses evidentiary issues. Argument I was titled, "It was prejudicial error for the Court to summarily refuse to admit collateral impeachment of the government's principal witness." Additionally, at oral argument before the Court of Appeals, counsel argued that the evidence consisted of merely one government witness whose tainted testimony should not have been sufficient

to uphold a conviction.

Argument II of Appellants Opening Brief was titled, "It was prejudicial error for the prosecution to fail to disclose the government witness' inconsistencies between grand jury testimony and trial testimony." Giglio v. United States, 92 S. Ct. 763, was cited; Chief Justice Burger delivered the opinion of the Court.

The Court stated:

"A new trial is not automatically, required whenever the combing of the prosecutor's files after the trial had disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of

materiality of the evidence is required; a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury."

Counsel further argued that any evidence of Torino's contradictory statements would be relevant to his credibility and the jury was entitled to know it. The Ninth Circuit, in 1974, held:

"Government is obliged to disclose pertinent material evidence favorable to defense and rule applies not only to matters of substance, but to matters relating to credibility of government witnesses. United States v. Gerard, 491, F.2d 1300.

In the case at bar, informant Torrino stated at the Grand Jury Proceeding concerning Mr. Carrico's possible motive, "At the time, Kariko was hurting for money because he had a problem with the IRS and they had seized a lot of his things." (Page 9, line 22 - 25 Grand Jury Transcript.) At the time of trial, during cross-examination by defense counsel, Torino was asked:

Q. Did you ever tell any body that Mr. Carrico was in trouble financially?

A. Not in trouble financially.

Q. Did you ever tell any body that he had problems with the Internal Revenue Service?

Mr. Davidson: Objection, your Honor. This is . . .

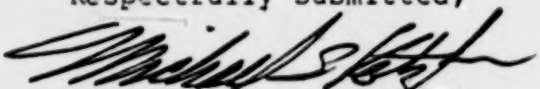
The Court: Objection sustained."

(page 159, line 4 - 11 Reporter's Transcript of Proceedings.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully Submitted,



MICHAEL S. KOTZKER
Attorney for Petitioner
Ralph Fredrick Carrico

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 82-1650
Plaintiff-Appellee,	D.C. No. CR. 82-626-R
vs.	
RALPH FREDRICK CARRICO,	MEMORANDUM
Defendant-Appellant.	

Appeals from the United States District Court for the Central District of California

Argued and submitted June 9, 1983

Before: CHAMBERS, SKOPIL AND FARRIS, Circuit Judges.

Carrico was convicted of three counts of controlled substance offenses in violation of 21 U.S.C Section 841 and 846, and of aiding and abetting in violation of 18 U.S.C. Section 2(a). He does not contest the insufficiency of the

evidence but raises issues of law.

He argues that he was denied the opportunity for full cross-examination. The government concedes that if there were such a denial, a reversal would be in order even without a showing of prejudice. United States v. Uramoto, 638 F.2d 84 (9th Cir. 1980). But the government amply demonstrates that the instances to which appellant points, to support his claim of reversible error on this score, are nothing more than instances where the government objections were properly sustained, e.g. where appellant's counsel's cross-examination sought to impeach the government witness on collateral matters, where his questions were ineptly framed, where hearsay or irrelavancy were involved, etc. We have reviewed the record and

find appellant's contention on this issue totally without merit.

Carrico also contends that he was improperly denied a continuance. A deputy sheriff had been subpoenaed by him for the date set for trial, September 14, 1982. On that date the trial was continued until October 5. Carrico did not inform his witness of the change in date until after his witness had left for a vacation. The court was not formally notified of this event until October 5 and counsel's explanations for his delay were less than convincing. There was no abuse of discretion in proceeding with the trial. We also note that counsel's description of the evidence his witness would give disclosed that it was in large part repetitive of other testimony.

Carrico argues that the closing

argument of counsel for the government was improper. We find vigorous argument, but no impropriety that would warrant a reversal. In any event, the district judge gave cautionary instructions that would have cured the impropriety, if there had been any.

We have examined appellant's other contentions and find them to be without merit.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH FREDRICK CARRICO, Appellant,	)	No. 82-1560
vs.	)	ORDER DENYING PETITION FOR REHEARING
UNITED STATES OF AMERICA Appellee.	)	

Before: CHAMBERS, SKOPIL and FARRIS, Ciruit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Skopil and Farris have voted to reject the suggestion for a rehearing en banc, and Judge Chambers has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised for the suggestion for en banc hearing, and no judge of the court has requested a

vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestions for a rehearing en banc is rejected.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,	)
	)
Plaintiff/Respondent.	)
	)
vs.	)
	)
RALPH FREDRICK CARRICO,	)
	)
Defendant/Petitioner.	)
	)

CERTIFICATE OF SERVICE

I hereby certify that the required copies of the Petition For Writ of Certiorari of Petitioner, Ralph Fredrick Carrico were served this 21st day of November, 1983, by first class mail, postage prepaid, upon the following:

UNITED STATES SUPREME COURT
Washington, D.C.

Mr. Bill Weber
U.S. Attorney's Office
312 North Spring Street
Los Angeles, California 90012

MICHAEL S. KOTZKER

Subscribed and sworn before me
this November 18, 1983

NOTARY PUBLIC

OFFICIAL SEAL
SONIA E. DE LEON
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires April 19, 1985

My commission expires April 19, 1985